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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

Number 413

JAMES J. DONOHUE, individually and as Town Chairman of the Town of Milwaukee, and

HERMAN P. FREYER, individually and as Clerk of the Town of Milwaukee, and

THE TOWN OF MILWAUKEE,

Plaintiffs-Petitioners,

vs.

THE VILLAGE OF FOX POINT,

Defendant-Respondent.

PETITION FOR REHEARING

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PETITION FOR REHEARING

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners respectfully pray for a rehearing of the order of this Honorable Court dated Nov. 12, 1957, denying their petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin.

BASIC FACTS

This was a proceeding brought by James J. Donohue in the Circuit Court for Milwaukee County, State of Wisconsin, against the respondent Village of Fox Point to declare null and void the proceedings of the respondent to annex certain lands in the Town of Milwaukee to respondent village and to have petitioners' proceedings to annex a portion of said land to the Village of River Hills adjudicated as prior and valid. Judgment dismissing petitioners' complaint was entered in the trial court, which judgment was affirmed by the Supreme Court of the State of Wisconsin.

ARGUMENT

We are aware of the mathematical percentages against petitioners on a rehearing petition, but in the original petition we were not aware of the *Myles Salt* case, 239 U.S. 478, and failed to raise the constitutional question of the validity of Sec. 62.07(1)(a) of the Wis. Statutes upon which the annexation is hinged.

We respectfully submit that under the ruling in *Myles Salt Company, Limited vs. Board of Commissioners of the Iberia and St. Mary Drainage District*, 239 U. S. 478, holding that although a Statute of the State may be valid, a petitioner may attack said statute as administered as depriving him of his property without due process of law.

The Louisiana Supreme Court in the *Myles Salt* case determined that the creation and determination of drainage districts being a legislative and lawful exercise of discretionary powers, the courts are without power to impugn or inquire into their motives. This Honorable Court reversed this holding that the legislature of the

state may constitute drainage districts and define their boundaries or may delegate such authority to local administrative bodies of the State and held that their action cannot be assailed under the Fourteenth Amendment *unless it is palpably arbitrary and a plain abuse.*

We respectfully submit that municipal corporations as well as Drainage Districts are subordinate creatures of the State and as such are subject to the restrictions imposed by the Fourteenth Amendment.

Houck vs. Little River Drainage District, 239 Wis. 254, 262.

The legislative act of the state or a subordinate body thereof may come in conflict with the due process clause of the Fourteenth Amendment when found to be arbitrary, unreasonable, confiscatory and flagrant abuse of power. See *Davidson vs. New Orleans*, 96 U. S. 97.

It is respectfully submitted that there must be a reasonable relationship between the territory sought to be annexed and the annexing municipality before such property can lawfully be annexed. Whethe or not this relationship actually exists is not finally for decision by the annexing municipality but must be subject to review by the courts when attacked on constitutional grounds.

The lands sought to be annexed in the *Donohue* case do not bear a reasonable relationship to the annexing municipality. The corridor allegedly connecting the forty-five acres southern tract is from 26.88 feet to 100 feet wide and more than one mile long, thus resulting in the annexation of land which has no reasonable connection with the annexing municipality.

Counsel respectfully submits that the annexing of such territory is palpably and plain abuse of the State of Wis-

consin statute relative to annexation set forth in our original Petition as Section 62.07 of the Wisconsin Statutes, on page 12 thereof, and we ask that the *Myles Salt* case be applied to the question of jurisdiction.

It is respectfully submitted that the Wisconsin Statute governing Annexations of Territory namely, Section 62.07(1)(a) is confusing, vague, and indefinite in that it requires a posting of notices at least 10 days and not more than 20 days before any petition for annexation is caused to be circulated.

62.07 of the Wisconsin Statutes, 1955 reads:

"ANNEXATION AND DETACHMENT OF TERRITORY

(1) Annexation Procedure.

Territory adjacent to any city may be annexed to such city in the manner following:

(a) A petition therefor shall be presented to the council 1. signed by a majority of the electors in such adjacent territory and by the owners of one-half of the real estate within the limits of the territory proposed to be annexed, or 2. if no electors reside in the said adjacent territory signed by the owners of one-half of taxable property therein according to the last tax roll, or 3. by a majority of the electors and the owners of one-half of the real estate in assessed value; provided, that no petition for annexation shall be valid unless at least 10 days and not more than 20 days before any such petition is caused to be circulated, a notice shall be posted in at least 8 public places in the municipality in which the adjacent territory is located, and a copy of such notice published in a newspaper of general circulation within the county in which said adjacent territory is located, at least 10 days prior to the time when such petition is caused to be circulated, such notice to set forth that an annexation petition is to be circulated, and including an accurate description of the territory involved."

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the order of this Court denying their petition for a writ of certiorari to the Supreme Court of the State of Wisconsin be reheard and vacated and that said petition for certiorari be granted.

Respectfully submitted,

SYDNEY M. EISENBERG,
1131 West State Street,
Milwaukee 3, Wisconsin,
Counsel for Petitioners.

CERTIFICATE OF COUNSEL

The undersigned, Sydney M. Eisenberg, attorney for petitioners hereby certify that the petition for rehearing filed in this cause is presented in good faith, and that in his judgment said petition is restricted to the grounds specified in paragraph two of Rule 58 of the Supreme Court Rules, and that the foregoing petition for rehearing is not presented for delay.

Sydney M. Eisenberg

CERTIFICATE OF SERVICE

I, the undersigned counsel, do hereby certify that a copy of the foregoing petition for rehearing has been served upon .....

..... counsel of record for respondent, by delivering to and leaving with said respondent counsel a true copy thereof.

_____